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SENGA ENGINEERING & CONSTRUCTION SDN BHD v. RICHWIN HOLDINGS (M) SDN BHD

HIGH COURT MALAYA, MELAKA
MOHD FIRUZ JAFFRIL JC
[CIVIL SUIT NO: 22-34-2011]
B 14 MARCH 2016

CONTRACT: *Building contract – Claim for works done – Construction of house carried out without approval of relevant authorities – House ordered to be demolished – Whether plaintiff or defendant's obligation to obtain written approval of relevant*
C *authorities – Whether house built in contravention of s. 70 of Street, Drainage and Building Act 1974 – Whether cause of action founded on illegal act could succeed – Whether both parties equally tainted – Whether court could assist either party which was part of illegality*

Pursuant to an agreement, the defendant appointed the plaintiff as the
D contractor to construct a three storey house on a piece of land belonging to the Roman Catholic Bishop in Melaka. The plaintiff carried out the works required and completed the construction of the house. By that time, the defendant had paid a sum of RM1,302,227 to the plaintiff, inclusive of variations. Upon the building being completed, the plaintiff issued a final
E statement of account and claimed a sum of RM578,528.69 being the balance due for works done. The defendant failed to pay the sum, resulting in the filing of this suit. On a separate footing, the house built by the plaintiff was declared illegal by the Melaka High Court for being in contravention of the provisions of s. 70 of the Street, Drainage and Building Act 1974 ('the Act').
F The house was then ordered to be demolished and was subsequently demolished by Majlis Bandaraya Melaka Bersejarah ('MBMB'). Hence, in response to the plaintiff's claim, the defendant filed a counterclaim for the sum of RM1,429,501.70 being special damages for the loss suffered by the defendant as a result of the house being demolished due to the plaintiff's act
G of carrying out the construction of the house prior without the approval of the relevant authorities. The issues that arose were *inter alia* (i) whether it was the plaintiff or the defendant's obligation to obtain the written approval of the land owner and that of the local authorities for the development of the project; (ii) whether the defendant owed the plaintiff a sum of RM578,528.69 being balance of the payment for the project; and (iii) whether in the event
H the building was built illegally or wrongfully in law, whether the defendant was entitled to the counterclaim against the plaintiff for payment for the work done on the said project.

Held (dismissing plaintiff's claim; dismissing defendant's counterclaim):

I **(1)** Both the conditions of the contract entered into between the parties and s. 70 of the Act contradicted SP1's testimony that he was purely a builder and need not be concerned whether proposed construction of the bungalow had been approved by the authorities or not. The argument that the agreement did not provide any duty or responsibility for the

plaintiff to obtain approval from the Municipal Authority for the building plan was also shallow as without the approval, there was no way that the plaintiff could proceed to erect the house. It was clear that SP1 knew that building plans must be approved by the local authorities yet he did not make the necessary effort to ensure that it was approved before embarking on the construction of the bungalow. (paras 25 & 26)

(2) The defendant clearly had knowledge that the landlord had not agreed to the construction of the bungalow. Without the landlord's written approval to the defendant to build the bungalow, the issue of building plans would be left hanging as the application to MBMB would have to be endorsed by the landlord. Further, evidence showed that the defendant knew that the landlord would not give approval for the construction works, yet had hastened the plaintiff to complete the house. The obligation lay with the defendant to obtain written approval of the land owner and that of the local authorities for the development of the project. Despite this, the plaintiff should not have proceeded with the construction of the house without approval of MBMB. It was clear as daylight that both the hands of the plaintiff and the defendant were tainted. *Ex turpi cause non oritur* action – the court could not render assistance to either party which was part of the illegality. (paras 29-34)

(3) Due to the fact that the house built by the plaintiff was declared as illegal, every stage of the building works was carried out illegally. A cause of action which was founded on an illegal act could not succeed. Therefore, the plaintiff was not entitled to claim payment for the works done. The core issue was that the house was built in contravention of the provisions of the Street, Drainage and Building Act 1974 and the house was therefore rendered as an illegal building. (para 34)

(4) The defendant was equally guilty of flouting the provisions of ss. 70 and 72 of the Act. That being the case, the defendant was not entitled to the counterclaim against the plaintiff. Section 66 of the Contracts Act as relied upon by the defendant was not applicable in this case. As both parties were equally tainted, the losses would simply lie where they fell. (para 34)

Case(s) referred to:

Browne v. Dunn (1893) 6 R 67 HL ***(refd)***

Chettiar v. Chettiar [1962] 1 All ER 494 ***(refd)***

Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***

Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor [2015] 6 CLJ 857 FC ***(refd)***

Sami Mousawi Utama Sdn Bhd v. Kerajaan Negeri Sarawak [2004] 2 CLJ 186 CA ***(refd)***

Scott v. Brown, Doering, McNab & Co [1892] 2 QB 724 ***(refd)***

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24, 66
Street, Drainage and Building Act 1974, ss. 70, 72

For the plaintiff - KF Wong; M/s Tan Hee Soon, Wong & Partners
For the defendant - TT Seng; M/s TT Seng & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Firuz Jaffril JC:

[1] This is the decision of the court on the plaintiff's claim and the defendant's counterclaim at the end of a full trial involving a total of seven witnesses (five for the plaintiff and two for the defendant).

Brief Facts

[2] Pursuant to an agreement dated 6 November 2007, the defendant agreed to appoint the plaintiff as the contractor to construct a three (3) storey house at Air Salak, Daerah Melaka Tengah, Melaka. The house was to be built on a piece of land belonging to the Roman Catholic Bishop. As the father to both the director's of the defendant already had an existing house on the land, permission to rebuild the old house was granted by the land owner subject to certain conditions to be fulfilled by the defendant. Under the agreement, the construction sum was agreed at RM798,770. The plaintiff carried out the works required and completed the construction of the house. By that time, the defendant had paid a sum of RM1,302,277 to the plaintiff, inclusive of variations. Upon the building being completed, the plaintiff issued a final statement of account and claimed a sum of RM578,528.69 being the balance due for work done. The defendant failed to pay the sum resulting into the filing of this suit.

[3] On a separate footing, the house built by the plaintiff was declared illegal by a judgment of the Melaka High Court dated 3 March 2010 *via* Melaka High Court Suit No: 22-179-2008 for being in contravention of s. 70 of the Street, Drainage and Building Act 1974 which provides as follows:

Section 70 of the above act prescribes:

> (1) No person shall erect any building without the prior written permission of the local authority;
>
> (2) Any person who intends to erect any building shall submit:
>
> (a) to the local authority such plans and specifications as may be required by any by-law made under this Act; and
>
> (b) to the relevant authority such plans and specifications in respect of the sewerage system as may be required by any other written law.

[4] The house was then ordered to be demolished and was subsequently demolished by Majlis Bandaraya Melaka Bersejarah ("MBMB").

[5] Hence, in response to the plaintiff's claim, the defendant filed a counterclaim for the sum of RM1,429,501.70 being special damages for the loss suffered by the defendant as a result of the house being demolished due to the plaintiff's act of carrying out the construction of the house prior without the approval of the relevant authorities.

Issues For Trial

[6] For reasons best known to counsels of both parties, the plaintiff and the defendant filed separate issues to be tried marked as Bundles J and L. Upon perusal of both Bundles J and L, I can safely summarise ten issues for the court's determination:

(i) whether the defendant owed the plaintiff a sum of RM578,528.69 being the balance of the payment for the construction works;

(ii) whether there was an oral agreement between the plaintiff and the defendant to appoint the architect and engineer for the project;

(iii) whether it was the defendant or the plaintiff who appointed Ar Mohd Ghazali bin Mohd Khalil as architect and Messrs Hisham Design as the draughtsman for the project;

(iv) whether it was the plaintiff or the defendant's obligation to obtain the written approval of the land owner namely, the Bishop of Melaka – Johor Diocese and that of the local authorities for the development of the project;

(v) whether the plaintiff had carried out the project works in a workman like manner;

(vi) whether the variation works were instructed and confirmed by the defendant;

(vii) whether the building under the project was built illegally or wrongfully in law;

(viii) in the event the building was built illegally or wrongfully in law, whether defendant was entitled to the counterclaim against the plaintiff for payment for the work done on the said project;

(ix) if the plaintiff is entitled to payment for the work done, what is the balance amount owing that has not been paid;

(x) if the plaintiff is not entitled to payment for the whole building work done, whether the plaintiff shall refund the amount of RM1,302,277 which the defendant has paid to the plaintiff.

Preliminary Objection By The Plaintiff

[7] At the outset of their submission, counsel for the plaintiff raised a preliminary objection stating that the defendant had failed to deposit the sum of RM50,000 into court pursuant to the order granted by me in allowing the plaintiff's application for security for costs.

[8] I am surprised that this objection was raised only during the submission stage. Had I been informed that the defendant had failed to comply with the earlier order of this court, relevant directions could have been given.

[9] Be that as it may, this issue was sufficiently addressed in the hujahan balas defendant wherein this court was duly informed that the sum towards security for costs was duly deposited into court on 27 August 2015.

Preliminary Observation

[10] Having read the submissions by the plaintiff's counsel I find that a number of new issues which are not in the pleadings have been raised as this submission stage.

[11] The new issues include the following:

(a) that the defendant had a bad intention from the start to cheat the plaintiff to enter the agreement with the company which is a "$2 dollar company";

(b) that SD1 and the owner had misused construction documents to mislead the plaintiff to enter the agreement with them; and

(c) the production of the police report lodged against SP3 for perjury and the introduction of new photographs which were not in the common bundle of documents.

[12] It is trite law that parties are bound by its pleadings (see the decision of the Federal Court in *Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor* [2015] 6 CLJ 857 and *Gurbachan Singh Bagawan Signh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719).

That being the case, the introduction of the new issues; police report lodged against SP3 for perjury and new photographs at this stage is highly prejudicial and will be disregarded *in toto*.

[13] Similarly, the conduct of the plaintiff's counsel in submitting that I had in the course of the trial stated "tiada isu siapa yang perlu memperolehi kelulusan daripada tuan tanah adalah tidak dinafikan bahawa adalah tanggungjawab pihak defendan untuk memperolehinya" is highly improper. It is akin to holding this court to ransom on the decision to be made and not based on the evidence adduced at the trial. Suffice to say, whilst off-the-cuff

observations and guidance can be made by the court from time to time given the dynamics of an open court trial, it cannot be deemed to be making any final ruling or judgment on any issues until its final decision is delivered.

Court's Analysis & Finding

[14] Based on the pleadings and submissions filed by both parties at the end of the trial, both the plaintiff and the defendant were of the view that the agreement entered into between both parties was not illegal *ex facie* from the date of inception.

[15] I am in agreement with both counsels as the considerations and objects of the said agreement was indeed lawful as it is in line with the provision of s. 24 of the Contracts Act as reproduced below:

> What considerations and objects are lawful and what are not
>
> 24. The consideration or object of an agreement is lawful unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[16] Both parties submitted that the agreement is silent as to who was supposed to obtain these approvals. Both counsels were of the view that it was the manner in which the works under the agreement were carried out that was illegal wherein each, not surprisingly, blamed the other for causing the illegality.

[17] It was the plaintiff's case that it was not within their job scope to obtain the approval from the land owner as well as that of the local authorities prior to the implementation of the project.

[18] On the opposite end, the defendant submitted that the task of obtaining the approvals lies with the plaintiff and referred to cl. 1-4 of the agreement:

> NOW IN CONSIDERATION OF THE MUTUAL TERMS, CONDITIONS AND COVENANTS (THE ADEQUACY OF WHICH IS NOT DISPUTED) IT IS NOW HEREBY AGREED TO AS FOLLOWS:
>
> PART 1 GENERAL TERMS AND CONDITIONS
>
> 1. The Contractor will provide his expertise in building One Unit Bungalow as per The Customer TENDER DOCUMENT description as follows:

A Cadangan Membina Sebuah Rumah Kediaman 3 Tingkat Jenis Kekal, Terletak Di Air Salak, Daerah Melaka Tengah, Melaka.

2. The Contractor shall strictly follow the requirements listed in the Tender Document, with no obligation and alteration. Any changes in materials, design, etc. shall get the confirmation and finalisation from the customer.

B

3. The Contractor's quotation is based on the quotation submitted with reference No. Q0038 excluded the internal tiles, finishing, M & E and plumbing cost. These costs are to be advised later, and shall get the confirmation and approval of the customer. Any changes on the types of materials, specification shall be agreed by both parties, and the difference in cost with (*sic*) be added or subtracted from the total cost detailed in the quotation.

C

4. The Contractor shall (be) liable for all the construction work carried out within the period, with the specification listed under "Tender Document".

D

5. The project shall be completed within 9 months from the date of agreement.

[19] The defendant further submits that SP1, a director of the plaintiff who is also from Air Salak claimed that he can get the land owner's approval for purposes of building the house under the agreement and thereafter the submissions of the building plans for approval of the local authorities.

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[20] First and foremost, I wish to state that both counsels for the plaintiff and defendant failed to take cognisance of the provisions found in the tender documents itself (see pp. 4-356 of the agreed documents in Bundle B). Had that been done, perhaps the course of the hearing would have proceeded differently.

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[21] My perusal of the tender documents shows that part of it consists of the 'standard form of contract to be used for contract' wherein para. 11(C) of the contract (see p. 67 of Bundle B), which provides as follows:

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11. Statutory Obligations

(a) The Contractor shall give all notices and pay all fees and charges required to be given or paid under any written law, regulations and by-laws in relation to the execution of the Works or of any temporary works.

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(b) Any costs incurred by the Contractor in relation to fees and charges for removal of sewerage and supply of water and electricity, for the installation of permanent connections to public sewers and permanent water and electricity supply shall be borne by the GOVERNMENT. The GOVERNMENT shall reimburse the Contractor for such costs by adding it to the Contract Sum provided that such costs have not already been included in the Contract Sum by way of Provisional Sum by way of Provisional Sum or otherwise.

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(c) In addition, *the Contractor shall also comply in all other respects with the provision of any such written law, regulations and by-laws which may be applicable to the Works or to any temporary works and shall keep the* ***GOVERNMENT*** *indemnified against all penalties and liabilities of every kind for breach of any such provisions* (emphasis added).

(d) If after the Date of Tender (as specified in the Appendix hereto) there is any change or amendment in any such written law, regulations and by-laws which necessities any variation to the Works or any temporary works, the Contractor shall before making such give to the S.O. written notice specifying and giving the reason for such variation and apply for an S.O.'s instruction in reference thereto.

[22] The tender document was incorporated as part of the agreement dated 6 November 2007. To my mind the word "Government" used in the tender documents has to be read as "employer" for the purposes of the tender exercise to which the plaintiff participated bearing in mind that the tender documents were a reproduction of the PWD Form 203. The plaintiff participated in the tender exercise of the defendant and is deemed to have notice of the conditions and provisions of the tender. Moreover cl. 2 of the general terms and conditions of contract as produced earlier clearly states:

2. The Contractor shall strictly follow the requirements listed in the Tender Document, with no obligation and alteration. Any changes in materials, design, etc shall get the confirmation and finalisation from the Customer.

[23] Basically, cl. 11(c) as reproduced above makes it mandatory for the plaintiff to comply with all provisions of the law for purposes of constructing the bungalow belonging to the defendant. This would include the provisions of the Street, Drainage and Building Act 1974.

[24] Section 70 of the above act prescribes:

(1) No person shall erect any building without the prior written permission of the local authority.

(2) Any person who intends to erect any building shall submit:

(a) to the local authority such plans and specifications as may be required by any by-law made under this Act; and

(b) to the relevant authority such plans and specifications in respect of the sewerage system as may be required by any other written law.

[25] Both conditions of the contract and s. 70 of the Act, contradicts SP1's testimony that he is purely a builder and need not be concerned whether proposed construction of the bungalow had been approved by the authorities or not. The argument that the agreement does not provide any duty or responsibility for the plaintiff to obtain approval from the Municipal Authority for the building plan is also shallow as without the approval, there is no way that the plaintiff can proceed to erect the house.

[26] Based on the evidence of SP1, it was clear that SP1 knew that building plan must be approved by the local authority, yet, he did not make the necessary effort to ensure that it was approved before embarking on the construction of the bungalow. SP1 even admitted that he took a risk in carrying out the works without approval. In fact during cross-examination, SP1 admitted that his reasoning to quickly start work was he would only get payment when he starts work and that he had asked for the defendant's permission to start as the timeline to complete the bungalow was nine months from the date of the agreement.

[27] During re-examination, SP1 admitted that he thought the building plan was approved as this was a tender project. The result of proceeding with the construction of the bungalow rendered the building illegal as was held in Melaka High Court Suit No: 22-179-2008 for being in contravention of s. 70 of the Act. Accordingly, the building constructed by the plaintiff was ordered to be demolished.

[28] Whilst the defendant's counsel had submitted that he relied on the expertise of the plaintiff in building the bungalow (reliance was considerably placed on Part 1 of the general terms and conditions of the agreement), I am of the view that the defendant too was equally guilty for contravening the provision of s. 70 of the Act.

[29] The defendant clearly had knowledge that the landlord had not agreed to the construction of the bungalow. The evidence given by SP3, the designer for the house capture *in verbatim* as follows, amplifies this fact:

> Tuan rumah tahu tanah ini tak akan dapat kelulusan. Sebab dia tak dapat pastikan tuan tanah akan sign ... Apabila tuan rumah dah tengok, kita minta dokumen untuk submit kelulusan. Dia tak dapat berikan. Dari situ kita tahu memang tak akan dapat kelulusan.

[30] Without the landlord's written approval for the defendant to build the bungalow, the issue of building plans would be left hanging as the application to MBMB would have to be endorsed by the landlord. It should be borne in mind that SP3 was the person responsible to arrange for the approval of the building plans *via* Ar Mohd Ghazali bin Mohd Khalil. What is most alarming about SP3's evidence is that he was never cross-examined by the defendant's counsel. That being the case, I have no choice but to accept SP3's testimony on this issue. See *Browne v. Dunn* (1893) 6 R 67 HL. The defendant is therefore estopped from contending otherwise.

[31] Based on the evidence given by SP1 that despite SD1 receiving the notice dated 20 June 2008 from MBMB (see p. 57 of Bundle D), which amongst others instructed the defendant to stop work on the house, the defendant hastened the plaintiff to complete the house works reason being he wanted to move in as quickly as possible. This fact was never challenged by the defendant.

[32] During cross-examination of SD1, he admitted that the church did not approve the construction works but took the position that he had an oral agreement with the plaintiff whereby the plaintiff was responsible for obtaining approval from the landlord. To my mind, this fact was never proven.

[33] In view of the fact that SP3 was an independent witness who had no interest in the outcome of the suit, I am inclined to adopt SP3's version of events that the defendant knew the landlord will not give approval for the construction works. Thus, it is clear as daylight that both the hands of the plaintiff and defendant are tainted. That being the case, the court cannot render any assistance to either party. *Ex turpi causa non oritur actio* – the court cannot render its assistance to either party which was part of the illegality.

[34] Having said the above, for the sake of completeness the court's finding on the issues to be tried are as follows:

(i) whether the defendant owed the plaintiff a sum of RM578,528.69 being balance of the payment for the project?

Due to the fact that the Suit No: 22-179-2008 judgment had declared the house built by the plaintiff as illegal, every stage of the building works was carried out illegally. A cause of action which is founded on an illegal act cannot succeed (*Chettiar v. Chettiar* [1962] 1 All ER 494 at p. 498). Therefore the plaintiff is not entitled to claim payment for the work done.

(ii) whether there was an oral agreement between the plaintiff and the defendant to appoint the architect and engineer for the project?

Irrelevant. Regardless of who was supposed to appoint the architect and engineer, both the plaintiff and defendant were prohibited from commencing construction works without the building plans being approved.

(iii) whether it was the defendant or the plaintiff who appointed Ir Mohd Ghazali bin Mohd Khalil as architect and Messrs Hisham Design as the draughtsman for the project?

Irrelevant. The core issue is that the house was built in contravention of the provisions of Street, Drainage and Building Act 1974 and rendered as the house an illegal building.

(iv) whether it was the obligation of plaintiff or the defendant to obtain the written approval of the land owner namely, the Bishop of Melaka – Johor Diocese and that of the Local Authorities for the development of the project?

The obligation lies with the defendant. Despite this, the plaintiff should not have proceeded with the construction of the house without approval of MBMB.

(v) whether the plaintiff had carried out the project works in a workman like manner?

In light of the illegality issue, it did not matter anymore.

(vi) whether the variation works were instructed and confirmed by the defendant?

Whilst there is evidence to show that the defendant did instruct a small number of variation works, there is also evidence that the confirmation of the variation works was forged namely the signature of SP3. However, as stated earlier, all works carried out by the plaintiff is rendered illegal due to contravention of s. 70 read together with s. 72 of the Street, Drainage and Building Act 1974.

(vii) whether the building under the project was built illegally or wrongfully in law?

The answer is affirmative as this was already decided by the High Court in Suit No. 22-179-2008.

(viii) in the event the building was built illegally or wrongfully in law, whether defendant was entitled to the counterclaim against the plaintiff for payment for the work done on the said project?

The defendant was equally guilty of flouting the provisions of ss. 70 and 72 of the Street, Drainage and Building Act. That being the case, the defendant is not entitled to the counterclaim against the plaintiff. Section 66 of the Contracts Act as relied upon by the defendant is not applicable in this case. As both parties were equally tainted before the court, the losses will simply lie where they fell. See *Sami Mousawi Utama Sdn Bhd v. Kerajaan Negeri Sarawak* [2004] 2 CLJ 186.

(ix) if the plaintiff is entitled to payment for the work done, what is the balance amount owing to the plaintiff?

The plaintiff is not entitled to any balance amount owing for work done.

(x) if the plaintiff is not entitled to payment for the whole building work done, whether the plaintiff shall refund the amount of RM1,302,277 which the defendant has paid to the plaintiff?

As the defendant was equally guilty as the plaintiff for contravening the provisions of s. 70 of the Street, Drainage and Building Act 1974, the loss of the defendant shall lie where it falls. See: *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21 following Lindley LJ in *Scott v. Brown, Doering, McNab & Co* [1892] 2 QB 724:

> No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the

illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.

No refund is to be ordered.

[35] Accordingly both the plaintiff's claim and the defendant's counterclaim are dismissed with no order as to cost.